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Supreme Court of the United States

October Term 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL,
Appellants

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the District Court of the United States for the Eastern District of Virginia

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REPLY BRIEF FOR APPELLANTS

The Interstate Commerce Commission and the carrier appellees have filed briefs defending the judgment below which sustained the order of the Commission. But on every essential issue the Commission and the appellee carriers differ materially. Thereby their briefs illustrate the confusion resulting from the Commission's action.

1. **The issue here is: What tribunal shall determine and apply the law to the facts?** Appellants have stated

the question here as whether the Commission unlawfully declined to take jurisdiction (question presented, brief 2).[1] The Commission states the question similarly, as whether it was required "to adjudicate and enforce the claimed contractual rights * * * of dissenting stockholders" (question presented, ICC brief 2).[2] The issue here, then, is simply whether the Commission is the tribunal for the adjudication of shareholders rights in connection with a merger, at least where the shareholders have preserved their rights.[3]

[1] "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require." *The Resolute*, 168 U.S. 437, 439. See also *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718. In the words of Mr. Justice Holmes, jurisdiction is "authority to apply the law to the acts of men". *Wedding* v. *Meyler*, 192 U.S. 573, 584. Here the Commission held the question of the merits "not within our province to decide" (R. 54), thereby plainly holding itself to be without jurisdiction. In this Court the Commission states that it was "disclaiming its jurisdiction to pass upon claims of contractual rights" (ICC brief 6).

[2] The Commission repeats this issue many times. It characterizes appellants' position in the administrative proceedings as "based upon the sole ground that the proposed report failed to accord them, as preferred stockholders, their asserted statutory and contractual rights claimed to have been preserved to them under the laws of the State of Michigan" (ICC brief 4). It twice repeats this statement of appellants' position (*id.* 5, 10) plus appellants' contention "that the Commission is the one and only forum in which such rights may be adjudicated and enforced; and that consequently the Commission's failure to adjudicate these claimed rights and make appropriate provision for their enforcement constituted a failure to perform its full statutory duty" (id. 5).

[3] The issue was raised in the administrative proceedings as the Commission's brief admits (ICC brief 4, 5). But the court below (appellants' brief 10, 21) and the carrier appellees here (C & O brief 2, 22, 34, 42-44) apparently have drawn a distinction between minority stockholders and "dissenting" stockholders. Appellants as holders of Marquette preferred did not vote for the merger, voted against it, and also filed formal "dissents" from the merger. They did the latter for two reasons: The proxy statement submitting the merger to vote of the shareholders appears to require "dissatisfied stockholders" to file notices of dissent (R. 99, 175-176). Secondly, Michigan law under which they held their shares has long required that objectors shall take care not to waive their rights. *Swartwout* v. *Michigan Air Line R. R. Co.*, 24 Mich. 389, 392-394; *Monroe* v. *Fort Wayne etc R. R. Co.*, 28 Mich. 272, 274-275; *Wells* v. *Rogers*, 60 Mich. 525, 532, 27 NW 671. Hence the only significance of the word "dissenters" is that those who have dissented have taken care to preserve their rights in every conceivable way. Manifestly the preservation of their rights by dissenting could not possibly place appellants in a worse position than if they had made and preserved the issue without necessity of formally dissenting (appellants' brief 20).

In this Court the Commission disclaims that it did anything more than leave the merits to judicial tribunals (ICC brief 21-22):

> A factual finding that [minority stockholders] will be accorded fair and equitable treatment is far removed from adjudicating the contractual right of dissenters and enforcing such rights under the power to annex just and reasonable conditions to the approval. * * * The Commission * * * left to the courts the question as to whether dissenting stockholders were entitled to better treatment in satisfaction of a contractual obligation due them from Pere Marquette.

This representation is made to this Court pursuant to statutory authority (49 U.S.C. 16(11)). The Commission is in the best position to judge of what it did and what it intended. Compare *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 145 n. 6; *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 241. The carrier appellees are therefore in no position to assert the contrary.

The carrier appellees appear to adopt a different interpretation of what the Commission did.[4] Actually, how-

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The Commission makes no assertion to the contrary here. But the carrier appellees seem to attach importance to the status of appellants "as dissenting stockholders" (C & O brief 2). The Commission used the phrase to characterize appellants in its report (R. 54) and, in the complaint filed in the court below, appellants therefore paraphrased the ruling (R. 3 ¶6) to which they attached the full report of the Commission (R. 5 *et seq.*), thereby making it a part of the pleading "for all purposes" (Rule 10(c), Federal Rules of Civil Procedure; compare C & O brief 18-19 n. 10). Appellants do not contend that, by dissenting, they did more than preserve their rights (C & O brief 22). Save that their rights to a determination of the merits were thereby surely preserved, appellants do not demand "special treatment" (C & O brief 33-34) or contend that they became a "favored class" (*id.* 42) or so gained "additional rights" (*id.* 43).

[4] Appellants' brief points out that, although the Commission considered all other shareholders' rights, it held itself without authority to determine or accord appellants their full prior equities arising by virtue of accumulations of unpaid dividends on their preferred stock (appellants' brief 19-20). The carrier appellees, however, assert that there was "an administrative evaluation of all their stipulated priorities in the light of all the pertinent facts" (C & O brief 3) and they insist that the Commission "weighed all the stipulated priorities of the Pere Marquette Preferred, including its accumulated dividends and preferential rights in

ever, they do not say that the Commission determined and applied appellants' rights with respect to cumulations of preferred dividends but, instead, they argue that on the merits appellants have no rights in that regard (C & O brief 11-12, 35 *et seq.*). Indeed, in terms of "remedy" the carrier appellees admit that the Commission

> made no effort to determine whether any such remedy was actually available, still less to determine what it would actually yield on prosecution, if available * * * (*id.* 51.)

The issue thus posed on the merits, whether in terms of right or remedy, is the subject of point 3 of this reply brief *infra*. Both the Commission and the carriers acknowledge that the issue concerns the right of appellants to recognition of equities arising by virtue of cumulations of unpaid dividends on their preferred stock. The Commission contends that the subject is not within its jurisdiction to consider or determine as set forth in point 2 *infra*. The carrier appellees take a different ground and insist that, on the merits, there is nothing more for the Commission to consider or determine as set forth in point 3 *infra*.

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the event of liquidation, in comparison with the terms and characteristics of the new securities, in the light of all the pertinent facts, including the history of the past and the prospects for the future, with respect to business, earnings, assets and other elements of value" (*id.* 21). They find the issue to be not "not * * * whether the full priority rule applies in mergers under Section 5, but whether the Commission exercised its informed discretion in accordance with that standard" (*id.* 29). They state that "the Commission did not disclaim jurisdiction to enforce the just and reasonable equivalent of the old securities * * * but on the contrary undertook to apply that standard with all the resources at its command" (*id.*). They ground this assertion on the Commission's review of the merger plan (*id.* 29-30) whereas here the point is that, in what it did, the Commission avowedly declined to concern itself with a determination or application of full prior equities arising from accumulated dividends on preferred stock (appellants' brief 19-20). The carrier appellees conclude that the Commission "did its full duty to assure 'just and reasonable' treatment by an administrative evaluation of all the stipulated priorities in the light of all the pertinent facts and its action, being in accord with legal standards, is conclusive" (C & O brief 45).

2. **The Commission's present attempt to limit its jurisdiction, respecting mergers, to "transportation" issues as it distinguishes them from those respecting "private rights" directly involved therein is contrary to the statute, departs from the established course of administration and judicial decision, and is unworkable.**—Unlike the carrier appellees, the Commission attempts to carve out of the statute an area where, it here insists, it has no proper jurisdiction because "private rights" are involved (ICC brief 11, 22-31) and because of the burden which otherwise it would be required to shoulder (*id.* 32). But the latter reason, based on a desire to lighten the administrative load, is no legitimate ground for departure from the Act of Congress. *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198. And whether private rights are beyond the Commission's powers of protection depends upon the terms of the statute. Appellants do not ask that the Commission adjudicate private rights "as such" (ICC brief 11) but only as they are directly and inextricably involved in merger terms which the Commission validates (appellants' brief 25 n. 9). Nor, for the same reason, is it suggested that the Commission is given "carte blanche authority to act on any subject without reference to its relationship to the public purposes of the Act" (ICC brief 12). It may well be admitted that "the public interest inherent in the preservation of adequate and efficient transportation service is the dominant note" of the statute (*id.* 13). But that private rights must as often as not be determined and enforced in executing public policy has been made familiar by the administration of the federal labor laws, insurance laws, utility laws, and so on.[5]

[5] Thus, for example, the Labor Board may set aside private contracts or award back pay to employees. But its proceeding "is not for the adjudication of private rights" since it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce". *Nat. Licorice Co.* v. *Labor Board*, 309 U.S. 350, 362. "The Interstate Commerce Act * * * imposes upon the carrier many duties; and it creates in the individual corresponding rights." *Federal Trade Comm.* v. *Klesner*, 280 U.S. 19, 26. "An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v.

Here the Commission's position is that, where private rights are concerned, the courts have original jurisdiction and the administrative agency has none.[6] The situation thus presupposed by the Commission is the contrary of that usually obtaining, in which the administrative agency has the primary jurisdiction and the courts have a limited one of review.[7] The Commission seeks to justify this unusual result by limiting its "exclusive and plenary" jurisdiction to the "transportation" objectives stated in section 5 of the Interstate Commerce Act (ICC brief 18-19). Its theory is this: Transportation objectives are stated in subparagraphs (c), (d), and (e) of section 5(2) of the Act and "no conditions are inserted with respect to stockholders' rights" (*id.* 15, 19). Therefore the terms "exclusive and plenary" in section 5(11) are to be operative "only within the delegated authority as defined by other provisions of Section 5" (*id.* 19). Constitutional problems, it argues, would otherwise arise from "such drastic

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United States, 307 U.S. 125, 142. The necessity of determining and dealing with private rights in connection with corporate reorganizations, under statutes vesting federal agencies or tribunals with jurisdiction over such reorganizations, is set forth in appellants' opening brief (point 4, pp. 35-28) and is one of the subjects of point 3 of this brief *infra*.

[6] The position of the Commission is that "there is nothing in the statute "which lends support to the argument that, the Commission, in dealing with consolidations and mergers embraced by those provisions, has succeeded the courts in the adjudication of contractual rights of parties affected thereby" (ICC brief 11). "State law remains effective, whether it be to govern the corporate procedure or to provide a means of paying off non-assenting shareholders" (*id.* 14). "It is not to be presumed that Congress by the mere statement that 'the authority conferred by this section shall be exclusive and plenary,' intended to invest the Commission with jurisdiction to adjudicate the infinite variety of legal issues which might arise in connection with mergers to the exclusion of all judicial process" (*id.* 19).

[7] Ordinarily any other relationship is held to be "wholly inconsistent with the administrative power conferred". *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441. For the consistent application of the rule see *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 138 *et seq.*; *Smith* v. *Hoboken R. Co.*, 328 U.S. 123, 128-129; *Illinois Comm'n* v. *Thomson*, 318 U.S. 675, 686; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 404; *St. Louis, etc. Ry.* v. *Brownsville Dist.*, 304 U.S. 295, 301; *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 343 *et seq.*; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 513-515; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

delegation of power to an administrative body * * * to be read out of three words, 'exclusive and plenary'" (*id.* 18-19).* "Important powers should not be read into the Act by implication but should be conferred in clear and unmistakable terms" (*id.* 19). But the vice of this argument is that it ignores the specific terms of the statute, the setting of the quoted words in it.

The statute involved does many things. In paragraphs (c), (d) and (e) of section 5(2), it states certain objectives of a public interest nature for the Commission to enforce, since Congress does not confer administrative authority except for some national purpose and a failure to state a public policy would render the statute subject to attack on constitutional grounds. *Currin* v. *Wallace*, 306 U.S. 1, 16-18, and note 8 *supra*. Also, in providing for the administrative execution of that policy Congress has not provided for operations after the fact (as in the simplification of holding company systems under the Public Utility Holding Company Act), but section 5(2) of the Interstate Commerce Act has required the approval of railway consolidations as a prerequisite to validity:

> (a) It shall be lawful with the approval and authorization of the Commission * * * for two or more carriers to consolidate or merge their properties * * * into one corporation * * *
>
> (b) If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction * * * will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *

These provisions can and do stand independently of paragraphs (c), (d), (e), and (f) of section 5(2). As such

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*But see *United States* v. *Rock Royal Co-Op*, 307 U.S. 533, 574; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 397-398; *Hirabayashi* v. *United States*, 320 U.S. 81, 102.

they are plainly within the permissible scope of delegations of authority. *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104-105.

There are two further reasons why the Commission's theory of limited objectives, and hence limited administrative powers, will not hold. Section 5(11) provides that

> The authority conferred by this section shall be exclusive and plenary * * *

These words must be taken together, as well as separately. "Exclusive" would seem to rule out primary jurisdiction on the part of any other tribunal whether state or federal (see note 7 *supra* and note 6 of appellants' opening brief at page 15). "Plenary" means full and complete (*id.* 15). "Exclusive and plenary" therefore leaves no room for primary jurisdiction in any other tribunal and no want of authority in the Interstate Commerce Commission. From the standpoint of language there is thus full jurisdiction in the Commission over "private rights" as well as "transportation issues". Secondly, section 20a is also operative here, because no carrier may merge without an exchange of securities and assumption of liabilities. The extensive provisions of this section, in which by subsection (7) the authority of the Commission is also "exclusive and plenary", contain no specification of separate transportation objectives so that the Commission's theory respecting section 5 (brief 14-15, 19) cannot apply. Since the Commission did not undertake to determine the liability to the holders of Marquette preferred (R. 54-55), it could not exercise its jurisdiction under section 20a save in a speculative or "exploratory" fashion (ICC brief 6; appellants' brief 21-22). It is manifestly untrue, as the Commission here asserts, that section 20a deals "with transactions having only prospective effect" or that under it "the question of adjustment of existing private contractual rights, such as are necessarily involved in a merger, was not present" (ICC

brief 17). The report and order here involved deal expressly with the issuance of securities under section 20a with reference to the very "private rights" here in issue (R. 55-56, 64-65).

Moreover, it is impracticable—if not wholly impossible—to draw a line between shareholders' rights and transportation issues when the former are involved in merger terms presented to the Commission for decision. The different positions of the Commission and the carrier appellees in this very case illustrate the inevitable confusion arising therefrom, for the Commission denies that it has taken jurisdiction here (point 1 *supra*) while the carrier appellees insist that it has done the contrary (note 4 *supra*). The Commission's report in this case demonstrates the inseparable nature of the problem (see appellants' opening brief 19-20). Manifestly the Commission could not approve a merger plan which omitted recognition of a whole class of stock or bonds or debts. It therefore interprets its jurisdiction as a matter of degree. In attempting to rationalize that irrational position it therefore makes a number of necessarily inconsistent arguments as follows:

(1) Apparently it would assume jurisdiction even over private rights or contractual arrangements "as it finds necessary" (ICC brief 14-15). Beyond matters of "national transportation policy" it argues that "the scope of what it should consider * * * is left to the Commission's discretion" (*id.* 15).* But this is a change of position, for its report finds the issue here beyond its "province to decide" (R. 54). Later in its present brief it argues for ten pages that it "is without power" (ICC brief 22 *et seq.*).

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* Assuming *arguendo* that the Commission has a discretion, the cause would nevertheless be required to be remanded in order that it may exercise that discretion. *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194; *Siegel Co.* v. *Trade Commission*, 327 U.S. 608, 614. *Cf. United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

(2) Again, the Commission says that it "has insisted upon the submission of terms and conditions which will protect the interests of minority stockholders" but differentiates the cases on the ground that in some of them protection was "necessary and incidental to its determination of the public interest" (ICC brief 21). Such a form of indefinite jurisdiction runs counter to the concept of administrative jurisdiction which this Court has established. "The power to decide a matter can hardly be made dependent on the way it is decided." *Bethlehem Co. v. State Board*, 330 U. S. 767, 775, and see the authorities listed in note 6 of appellants' opening brief at page 15.

(3) The Commission ineffectually attempts to distinguish its practice of according protection to minority shareholders in acquisition-of-control cases (ICC brief 10, 21). It argues that in such cases, unlike mergers, its approval is "final and binding upon the minority interests" (*id.* 10). But orders in that type of case are as much subject to judicial review as in a merger case such as here involved. *Chicago Junction Case*, 264 U.S. 258, 270, and *Cleveland, C. C. & St. L. Ry. Co. v. Jackson*, 22 F. 2d 509, 511, both cited by the Commission in its report here (R. 54). Moreover, it is obvious that an actual merger, which completely extinguishes a corporation as is here the case (R. 20, 103), inevitably operates more completely and more drastically upon the stock in the extinguished corporation than in the case of a mere acquisition of control through ownership of some stock. That "single ownership is created and separate ownership ceases" (ICC brief 21) aggravates rather than ameliorates the lot of minority interests.

(4) It is therefore with complete inconsistency that the Commission states that "it has always been the Commission's practice in Section 5 proceedings not to involve itself in private disputes between stockholders or others arising from contractual arrangements" (*id.* 20). None

of the administrative M.C.C. opinions cited for this proposition on page 20 of the Commission's brief relate to minority shareholders' rights but involve instead various claims of outsiders or, in one instance, an attempt of the two principals to have the Commission adjudicate a dispute between them as to the terms of their own acquisition contract. The Commission's present disavowal of responsibility in cases involving "contractual arrangements" is to be contrasted with the recent ruling of this Court that, under this statute, the Commission and "not the courts" has exclusive authority to determine the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties". *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150.

(5) The final and extended argument of the Commission is that it is

> without power to pass upon private rights which are neither dependent upon or ancillary to the exercise of its statutory authority. (Brief 22 *et seq.*)

This statement of course begs the question. Whether the rights here involved are "dependent upon" the exercise of its statutory authority is the problem in this case. More specifically, the question here is whether its "statutory authority" is "exclusive and plenary" respecting the issue in this case. In the present case the issue is imbedded in, and arises solely from, the terms and conditions of the merger agreement. As the following analysis shows, the cases now strongly relied upon by the Commission (brief 23-31) *did not involve mergers and consequently presented no corporate reorganization issues.*

Cleveland, C. C. & St. L. Ry. Co. v. *United States*, 275 U. S. 404, was not a merger case but involved an order of the Commission directing a carrier to establish a switch connection under section 1(9) of the Act. Similarly *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U.S.

479, was not a merger case but involved an order of the Commission permitting a carrier to contract, over the protest of a minority stockholder, for the use of certain facilities and acquire the use of others. *Claiborne-Annapolis Ferry* v. *United States*, 285 U.S. 382, involved nothing more than a competitor's challenge to an order of the Commission permitting a carrier to establish a ferry. *N. Y. Central Securities Co.* v. *United States*, 287 U.S. 12, was not only not a merger case but involved acquisition of control by a lease. Here the Commission has attempted to distinguish that very type of case as one requiring a protection of minority shareholders (ICC brief 10, 21). Moreover the excerpt which the Commission quotes (*id.* 23) demonstrates that a governing factor in the case was the *permissive* nature of the administrative order (287 U.S. at 26-27) whereas here the Commission's action *forces* appellants to accept an exchange of stock which impairs their equity arising by virtue of cumulated unpaid dividends. The three lower court cases with which the Commission concludes its brief involved an acquisition of control (brief 25-26), a motor carrier lease (*id.* 26-28), and a stockholder's derivative action in which an attempt was made to have a finance proceeding before the Commission treated as res adjudicata of issues in the private action (*id.* 28-31).

From these cases the erroneous generality is drawn that "the determination of rights asserted to exist by virtue of contract is for the courts and not the Commission" (*id.* 32). Manifestly, they signify nothing more than that not all contract rights or torts need be determined in every kind of Commission proceeding. The requirements of law are very different in corporate reorganization cases. The subject has been epitomized by this Court in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U.S. 624, 634:

> When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claims against earnings or assets, that superior posi-

tion must be recognized by courts or agencies which deal with the earnings or assets of such a company.

The law in this respect is more fully set out in the fourth point of appellants' opening brief at pages 25-29. Unlike the Commission, the carrier appellees admit that state of the law.[10]

3. **Apart from the issue as to what tribunal is to decide the matter as set forth in points 1 and 2 above, the substantive law applicable in this case requires ultimate decision for appellants on the merits.**—If appellants are correct in the view that the Interstate Commerce Commission has exclusive and plenary jurisdiction of the issue here involved (points 1 and 2 *supra*), presumably the cause will be remanded to the Commission without further proceedings here on the merits.[11] In that respect the issue on the merits is a statutory one (see appellants' opening brief 13 *et seq.*) although there is a potential constitutional issue if the Interstate Commerce Act should be interpreted to permit a destruction of shareholders' rights

[10] They state that "Section 5 of the Interstate Commerce Act incorporates the same standard of equity practice that is embodied in the Bankruptcy Act and the Public Utility Holding Company Act" (C & O brief 21, 27). Both section 5 of the Interstate Commerce Act and railroad bankruptcy legislation, they admit, "may well be thought a part of a Congressional effort to center in the Commission, as the single expert tribunal, the administrative determination of all these matters throughout the field" (*id.* 26). "Exclusive and plenary", they acknowledge, are words which are "ordinarily given the effect of preempting the field, at least on all subjects touched in the Federal regulations" (*id.* 27). In this respect the present position of the carrier appellees is designed to foreclose further resort to the courts despite the Commission's contrary ruling in this case (R. 54), its position here (point 1 *supra*), and the representations of all the parties at the argument in the court below (see the references last listed on page 10 of appellants' opening brief).

[11] This Court requires the Commission to take jurisdiction when it has declined to do so or to discharge a duty laid upon it by statute. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 622, and cases there cited. For such a remand in a corporate reorganization case see *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 571. A question of state law will not be resolved by this Court in the first instance. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237.

as demonstrated by the decisions of this Court and the relevant legislative history of the statute here involved.[12] It is also to be noted that appellants make no demand that they be bought off forthwith in cash but simply that, in the exchange of securities, their full prior equities arising by virtue of cumulations of unpaid dividends be recognized in the formulation of the exchange ratio.[13]

The Commission here referred appellants to separate proceedings under state law for redress (R. 54; ICC brief 10) and it maintains that "state law remains effective" because "the Commission's authority does not permit it

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[12] See appellants' opening brief 14 note 5. The carrier appellees here twice assert, in passing, that section 5(2) of the Interstate Commerce Act overrides state law if the latter "were to the effect that a merger automatically matures a liquidation preference" (C & O brief 22) and that state law respecting dissenters may be overridden by the federal statute "where the potential burden * * * would * * * be so large as to impair the railroad's capacity for continued efficient public service" (*id.* 48). In this case the Commission gave its opinion that "it is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of state laws for compensation of dissenting stockholders on specified bases" (R. 53). That statement is unclear as to whether the Commission was referring to payments in cash (see note 13 *infra*) or merely the exchange ratio of securities. In any event it did not, in this case, assume to deny effect to state laws if non-assenting shareholders should pursue their remedy therefor separately (R. 54). Although its brief here asserts authority over "obstacles" in the way of state law, it also states that "the Commission's authority does not permit it to set aside these laws" respecting "paying off non-assenting shareholders" (ICC brief 14). However, on an earlier page, it asserts that it should not "have to recognize asserted legal rights as the *sole* measure of fair treatment" (*id.* 9). But none of these arguments are pressed on the part of the Commission and, since it has not assumed in this case to affect rights of shareholders under the law of the state of incorporation, no constitutional issue is presented.

[13] The carrier appellees appear to interpret appellants' claims as for "immediate payment" (C & O brief 28), "present payment" in cash (*id.* 35), a remedy for "payment in cash" or "a money judgment" (*id.* 46), "cash payment to dissenters * * * as a condition to the merger privilege" (*id.* 48), or a "cash recovery" (*id.* 51-52). Appellants, on the contrary, have adopted the formula specified by this Court for cases such as this and have asked for *either* cash or the equivalent of their rights in an exchange of securities. *Geddes* v. *Anaconda Mining Co.*, 254 U.S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41. The customary offer of cash or securities is illustrated in the first two merger cases cited by the carrier appellees in their brief at page 34 note 16. Also see their recognition of demands for "equivalents" in such cases (*id.* 46) and their well taken argument that shareholders may be satisfied in securities (*id.* 41).

to set aside these laws" (*id.* 14).[14] The carrier appellees, however, argue that federal law is the sole criterion for the decision of the issue on the merits in this case (C & O brief 35-49).[15] For this conclusion they cite *Vanston Com-*

[14] The Commission argues in its brief that appellants have "evaded" the issue here, apparently because their rights under Michigan law have not "already been incontestably established" (ICC brief 7). They contend that this is an "obvious infirmity" in appellants' position and complain that appellants "seek to have the Commission *judicially* determine the nature and extent of *private contractual rights* and use its authority to impose conditions upon its approval of the merger" (*id.* 8). The Commission's distaste for the task appears from the following statement in its report in this case (R. 53): "Counsel for Pere Marquette has joined with opposing counsel in debating the dissenters' rights under Michigan laws." Apparently the design of this argument is to bolster the Commission's failure to take jurisdiction as set forth in point 2 *supra*. However, it is to be noted that, if the Commission is the proper tribunal to determine the issue on the merits under state law, the facts that appellants have not reduced their claims to judgment in Michigan or that there may be the normal difficulties in determining and applying their rights would not defeat jurisdiction. Where state law applies, it is the duty of federal tribunals to "ascertain and apply it". *Huddleston* v. *Dwyer*, 322 U.S. 232, 236. They must "ascertain from all available data what the state law is and apply it." *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237. A dispute as to the application of state law to the facts of a particular case did not deter this Court from deciding *Erie R. Co.* v. *Thompkins*, 304 U.S. 64, 80.

[15] They argue that, under federal law derived from such statutory provisions as "just and reasonable", "a merger does not mature a stated liquidation preference" (C & O brief 35, 38, 41). *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80 and 332 U.S. 194, which they cite and discuss (C & O brief 39-40) has no similar corporate reorganization issue.

Although the carrier appellees have taken the position that in this case the Commission *did* determine the issue on the merits (note 4 *supra*) and was required to do so by the statute here involved (note 10 *supra*), they nevertheless must acknowledge the possibility of recourse to state procedure (C & O brief 45 *et seq.*) because the Commission did so (R. 54 and point 2 *supra*). They straddle this dilemma by apparently distinguishing between rights and remedies, contending that there might be "alternative remedies" in Michigan with which the Commission need have no concern "in its application of the Federal standard" (C & O brief 47, 49, 51, 42). But, in all its history, this Court has never relegated parties to empty "remedies". On the contrary "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678. 684. Conversely, a federal tribunal "may afford an equitable remedy for a substantive right recognized by a state even though a state court cannot give it." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 106. "If there be an admitted wrong, the courts will look far to supply an adequate remedy." *De Lima* v. *Bidwell*, 182 U.S. 1, 176-177. Remedies may not be so changed as to "impair the value of the right". *Richmond Corp.* v. *Wachovia Bank*, 300 U.S. 124, 128. Nor is it permissible "to make the remedy a shadow" since "reality rather than the form or label" controls. *Worthen Co.* v. *Kava-*

mittee v. *Green*, 329 U.S. 156, 162-163, which was a bankruptcy case and did not involve a corporate reorganization. They also cite *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, but their quotation (C & O brief 39) refers merely to this Court's commonplace ruling that "the applicability" of state law must be determined under principles of federal law (323 U.S. at 636 and note 18).[16] Here, whether regarded as primarily or secondarily a matter of state or federal law, the contractual or "charter" rights of appellants cannot be determined without reference to the law of Michigan under which they arise (appellants' opening brief, note 7 at page 22). If regarded as a problem in "federal" law because determined and applied by a federal tribunal under a federal statute, the cumulated accruals of unpaid dividends must nevertheless be recognized in the merger as part of appellants' equities. *Petition of Portland Electric Power Co.*, CCA 9, 162 F. 2d 618, certiorari denied Nos. 387-388 December 8, 1947. Manifestly the same result would ensue if the problem were regarded as one of state law in whole or part, as the last cited case also demonstrates.

Here the appellant shareholders derive their rights from relevant corporation law of Michigan (appellants' open-

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naugh, 295 U.S. 56, 62. See also *Ex parte Young*, 209 U.S. 123, 147; *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U.S. 437, 439. Rights and remedies are inseparable. *White* v. *Hart*, 13 Wall. 646, 653; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 552; *Bronson* v. *Kinzie*, 1 How. 311, 316; *Marbury* v. *Madison*, 1 Cranch 137, 163.

[16] The carrier appellees place great reliance on the *Otis* case (C & O brief 38-41) because there this Court refused to require all common stock to be wiped out in a corporate simplification proceeding under the Public Utility Holding Company Act. But that part of the ruling in that case is not applicable here for the following obvious reasons: No such facts have been made to appear here. There, if the preferred received all the new securities, the common would not only be completely and unjustly eliminated (323 U.S. at 632) but the preferred would eventually receive a windfall beyond their accrued rights (*id.* 637). There the merger was mandatory, while here it is a matter of contract between the corporate parties. There the compulsory federal statute had been adopted after the shareholders' contracts had vested (*id.* 37) while here voluntary railroad mergers were generally known and sanctioned long prior to the organization of Marquette. For the latter reason the present case falls within the scope of the contrary *Continental* and *Reading* cases as the opinion in the *Otis* case notes (*id.* 638-639).

ing brief 9 n. 3) and the Marquette charter (*id.* 8 n. 2). The appellees cite no Michigan law to the contrary.[17] The

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[17] The carrier appellees contend that in Michigan corporations dividends are payable only out of earnings when declared (C & O brief 35 n. 18). *Knight* v. *Alamo Manufacturing Co.*, 190 Mich. 223, 154 NW 24, was simply the attempt of a shareholder to force a corporation to pay dividends. The court held that the word dividend "does not mean simply profits" and that payment might be forced by equitable action but not one at law (p. 226). *Ellsworth* v. *Lyons*, 181 F. 55 was a bankruptcy case in which the court merely refused to permit assets to be paid to stockholders to the detriment of unsatisfied creditors. In *Lockhart* v. *Van Alstyne*, 31 Mich. 76, per Cooley, J., the Supreme Court of Michigan declined to permit the payment of dividends from other than profits expressly excepting, however, corporate reorganization cases (p. 79).

The quoted language from the *Guardian* case (C & O brief 36 n. 21) is immaterial here because, in the instant case, it is expressly recognized that the corporate existence of Marquette is terminated by this merger (R. 20, 103). For the same reason the Virginia case (C & O brief 36 n. 22) is immaterial here.

The authority of Michigan corporations to merge (C & O brief 12 n. 7) is immaterial to the issue here. *Kirby* v. *Saginaw Hotels Co.*, 253 Mich. 306, 235 NW 153, merely held that a shareholder, who had become such after the enactment of the statute permitting consolidations, could not defeat a merger (p. 310). *Wells* v. *Rogers*, 60 Mich. 525, 27 NW 671, merely held that a shareholder who had joined in a consolidation could not then avoid liability on his subscription to stock. *Detroit etc. Rr.* v. *Starnes*, 38 Mich. 698, holds only that a consolidation successor corporation succeeds to rights under a stock subscription (p. 701). *Monroe* v. *Fort Wayne etc. R. R. Co.*, 28 Mich. 272, is to the same effect except that, in addition, the subscriber was "an agreeing party" to the consolidation (pp. 274-275). The same was true in *Swartwout* v. *Michigan Air Line R. R. Co.*, 24 Mich. 389, 392-394, 404. *Voight* v. *Remick*, 260 Mich. 198, 244 NW 446, 449, certiorari denied 289 U.S. 756, holds that "the relation between a corporation and its stockholders is contractual in nature" (pp. 204-205), that by consolidation or otherwise the majority thereof may not manipulate its assets "in any manner which is unequal, unfair, inequitable, oppressive, discriminatory, or illegal" (p. 210), and that corporate shares may not be

> manipulated to the detriment of minority stockholders. A part of the stockholders of the corporations involved have no right to manipulate stock and property under their management and control in violation of the trust imposed in them as stockholders so that they acquire either an undue advantage or such stock and property on terms other and different from that accorded to minority stockholders who may not have agreed with their plan of management and control.

Thus the Michigan authorities cited by the carrier appellees support appellants instead. The *Sutton* case and other relevant authorities are noted briefly in appellants' opening brief at pages 8-9 notes 2 and 3. In the case at bar it is to be noted that the carrier appellees have long had control of Marquette (R. 9-11) and by this merger simply desire to effect a corporate reorganization in securing a physical and legal consolidation of properties. In *Stevenson* v. *Stekeleteel Lumber Co.*, 219 Mich. 18, 188 NW 449, the Supreme Court of Michigan held that a dissolution, in which a director had a personal interest, "to the end that he may get control of the business in his own right" renders him without capacity to act as a fiduciary (p. 29).

references of the carrier appellees to the law of other states are of course irrelevant, because corporation laws and charters differ even within a single state.[18] There are, indeed, states which, under some of their corporation laws, permit some writing down of accruals of dividends either through direct charter amendments[19] or by the merger process.[20] But none of these considerations are pertinent

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[18] The carrier appellees rely on scattered authorities from various states, chiefly "appraisal" cases (C & O brief 35 n. 20 and 37 n. 23). These gleanings from the morass of state corporation law manifestly cannot control the disposition of the merits here nor even illuminate the way. The carrier appellees have attempted in every possible way to import "appraisal" into this case. They offered to do so before the Commission (R. 54). They have instituted an appraisal proceeding in Virginia, naming all dissenters (C & O brief 11 n. 5). The attempt to have the Virginia law of "appraisal" apply is simply an indirect method of avoiding the very different law of Michigan. *Adams* v. *U.S. Distributing Corporation*, 184 Va. 134, 34 SE 2d 244. Admittedly Michigan is not a state which permits, in carrier consolidations or mergers, the writing down of accrued dividends through "appraisal" (R. 99). For the evils of that system see the report of the Securities and Exchange Commission to Congress entitled *Management Plans without Aid of Committees*, 1938 (appellants' opening brief 9 n. 4 and 22 n. 8). It is there noted that mergers may be selected for readjusting shareholders' rights where other methods of corporate reorganization would not permit the same result (*id.* 596-597) and that, in particular states, appraisal may or may not supersede equitable remedies (*id.* 602-609). See also *Roessler* v. *Security Sav. & Loan Co.*, 147 Ohio St. 480, 72 NE 2d 259, holding that intrinsic, rather than market, value controls on appraisal proceedings. Appraisal statutes applied and were recognized in the merger decisions of the Commission listed by the carrier appellees in their brief at page 34 n. 16.

[19] In these, and also merger, cases some courts preclude "conversion" of accrued arrearages of preferred. *Pearson* v. *Clam Falls Co-Op Dairy Asso.*, 243 Wis. 369, 10 NW 2d 132; *Harbine* v. *Dayton Malleable Iron Co.*, 61 Ohio App. 1, 22 NE 2d 281, 286-287; *Mills* v. *Penn-Lex Co.*, 36 NE 2d 828 (Ohio App.); *Wildermuth* v. *Lorain Coal & Dock Co.*, 37 NE 2d 201; *Yoakam* v. *Providence Biltmore Hotel Co.*, 34 F. 2d 533, 542.

[20] The carrier appellees cite a number of cases purporting to be of this type (C & O brief 35 n. 20 and 37 n. 23):

Federal United Corp. v. *Havender*, 24 Del. Ch. 318, 11 A 2d 331, was a suit to void a merger for failure to pay "in money dividends accrued" (p. 322). The court held that a dissenting stockholder had no right to veto a merger (p. 334) and that his right to accrued dividends was defeasible (p. 335). He had failed to ask appraisal under the Delaware statute and hence "a valuation cannot be demanded now" and "complainants must accept the terms of the merger agreement" (p. 344). There were also laches (pp. 344-348). In *Hottenstein* v. *York Ice Machinery Corporation*, 45 F. Supp. 436, no issue was made as to preferred arrearages in the trial court (p. 439) but on appeal Delaware law was construed to permit the cancellation thereof in the absence of gross fraud. 136 F. 2d 944. To the same effect is *Porges* v. *Vadsco Sales*

here, because it is admitted, and indeed is a term of the merger itself, that Michigan provides no "appraisal" procedure for the writing down of the equities of shareholders who do not assent to a merger. (R. 99 and see R. 54).

Respectfully submitted,

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Corp., 32 A 2d 148 (Del. Ch.), and *Langfelder* v. *Universal Laboratories*, 163 F. 2d 804. Compare *Zahn* v. *Transamerica Corporation*, 162 F. 2d 36.

Hubbard v. *Jones & Laughlin*, 42 F. Supp. 432, arose under the laws of Pennsylvania and held no more than that a dissenter, who had not asked for statutory appraisal, could not demand cash for the par value of his preferred stock plus arrearages of dividends (see note 13 *supra*). Contrary to the contentions of the carrier appellees is *Petry* v. *Harwood Electric Co.*, 280 Pa. 142, 124 A 802. The statutory amendment which appellees cite (C & O brief 37 n. 23) does not appear to affect this decision. It is to be noted that, in *Mortgage Bldg. and Loan Case*, 334 Pa. 81, 5 A 2d 342, the Supreme Court of Pennsylvania has held that dissenters become creditors.

Anderson v. *International Minerals & Chemical Corp.*, 295 NY 343, 67 NE 2d 573, was a case in which the plaintiff had failed to ask statutory appraisal and was therefore denied payment in cash. The court said that, on proper request, "every right of a dissenting shareholder is to be appraised and paid for" (p. 350). See also *In re O'Brien*, 45 NYS 2d 208; *Application of Behrens*, 61 NYS 2d 179; and *Amella* v. *Consolidated Edison Co. of N. Y.*, 73 NYS 2d 263, holding that actual value rather than market value governed appraisal. In *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 NY 185, 123 NE 148, it was held that dominant stockholders may not dissolve a corporation for the purpose of eliminating a minority or "for the purpose of depreciating the value of the corporate property and plaintiff's proportionate interest therein" (pp. 197-198).

New Jersey law is contrary to appellees' contention and citations. *Weisel* v. *Guantanamo Sugar Co.*, 134 N.J.Eq. 271, 35 A 215, aff'd 13 N.J.Eq. 506, 39 A 431, was a corporate recapitalization case in which it was held that a majority of the shareholders may not "destroy the cumulative portion of the contract held by preferred stockholders" (p. 273), that they could not even substitute common stock therefor (p. 274-275), and that merger cases differed only in that there was an alternative right to appraisal and payment in cash (p. 276). *Windhurst* v. *Central Leather Co.*, 101 N.J.Eq. 543, 138 A 772; 105 N.J.Eq. 621, 149 A 36; 107 N.J.Eq. 528, 153 A 402, dismissed on stipulation 296 U.S. 668, involved a failure of plaintiffs to resort to the statutory remedy of appraisal. See also *Clarke* v. *Gold Dust Corporation*, 106 F. 2d 598, 602.